

June 5, 2003

By Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: Petition For Declaratory Ruling Concerning The Bundling Of Local Telephone Service With Long Distance, CG Docket No. 03-84

Dear Ms. Dortch:

The New Jersey Division of the Ratepayer Advocate (“Ratepayer Advocate”) submits the following comments in response to the Public Notice issued by the Federal Communications Commission (“FCC”) on March 27, 2003 in the above captioned matter. The Public Notice seeks comments on three (3) issues: (1) whether the state claims set forth by the Petitioner in the complaint are preempted by the Communications Act and otherwise subject to the exclusive FCC jurisdiction; (2) whether local telephone service providers may provide local service only to their customers, or must by virtue of their filed tariff rates or otherwise, bundle local service with long distance service, even where a customer has no need for long distance service; and (3) if the long distance service is not required to be bundled with local service, does the practice of bundling violate the Communications Act.¹

The Ratepayer Advocate submits that any practice that requires a customer to select a long distance carrier in order to obtain local service (hereinafter referred to as “bundling local and long distance”) violates Sections 201(b) of the Communications Act of 1934.²

Section 201(b) of the Communications Act states that:

All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.

¹ See Public Notice, CG Docket No. 03-84, (rel. Mar. 27, 2003).

² Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

The bundling of local and long distance services is an unjust and unreasonable practice. A customer who wants local service only can not be denied the option to select no long distance carrier, i.e. “PIC NONE.”

Historically, local customers have had the option of electing local service only with the option to decline presubscribing to a long distance carrier. This option is commonly known as PIC NONE. Various local exchange companies (“LECs”) offer PIC NONE to their customers as reflected in their FCC tariff filings. A customer that elects PIC NONE option is usually assessed a nominal non-recurring charge by the LEC. This practice reflects the fundamental right of a customer to only receive services that it affirmatively wants and orders.

For example, the Federal tariffs filed by Verizon, Inc. (“Verizon”), clearly indicate that customers have an affirmative right to select or not select a long distance carrier. In the latter case, a customer may select PIC NONE if the customer wants no long distance carrier. The relevant portions of Verizon’s tariff provide as follows:

F.C.C Tariff No. 1, section 4.2 (D)(1)(b):

Choose no carrier as a preferred carrier, thus requiring 101XXXX code dialing to access all carriers. This choice can be made directly by contacting the Telephone Company.

F.C.C Tariff No. 1, section 4.2(D)(2)(b):

Choose no carrier as a preferred carrier, thus requiring 1011348 code dialing to access all carriers. This choice can be made by directly contacting the Telephone Company. In addition, new end users or Payphone Service Providers that do not select a preferred carrier will be assigned as PIC NONE.

F.C.C Tariff No. 1, section 4.2 (E)(1):

A customer may indicate that he does not want to be presubscribed to any carrier, or any carrier may submit a request to remove their PIC from a customer’s line when the carrier’s interLATA service to that customer is terminated for non-payment or other carrier tariff violation. When this happens, the customer will be required to dial 101XXXX or other access code (i.e., 950-XXXX) for all calls to all carriers. This line condition, designated PIC NONE, is considered a PIC for the purposes of administering rates contained in this tariff. When a customer’s line is changed to PIC NONE at the request of an carrier, a presubscription change charge as specified in section 4.2(G) following does not apply.

F.C.C Tariff No. 1, section 4.2(G):

The charge for change in presubscription. Rate: \$5.00

Additionally, the Ratepayer Advocate submits that any practice that requires a customer to subscribe to a long distance carrier as a condition of ordering local service is inherently discriminatory, and otherwise prohibited by Section 202(a) of the Communications Act. Section 202(a) of the Communications Act provides:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Section 207 of the Communications Act authorizes a customer to either file a complaint with the FCC or file suit in the appropriate United States District Court for any damages sustained by a customer from the action of a common carrier under the Communications Act.³

These tariff provisions reflect the established principle that each customer has the affirmative right to select and order the services that each customer wants. In regard to selection of a long distance carrier, a customer has the option and not an obligation to select a long distance carrier.

In *United Artists Payphone Corporation vs. New York Telephone and AT&T Co.*⁴ and in *Ascom Communications, Inc., v. Sprint Communications Co.*,⁵ the FCC reiterated a person can only become a customer by means of an affirmative action.⁶ When a customer does not intentionally or constructively order services, the customer cannot be

³ Section 207 states that:

Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as herein after provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of Competent Jurisdiction; but such person shall not have the right to pursue both such remedies.

⁴ See 8 FCC Rcd. 5563 (1993).

⁵ See 15 FCC Rcd. 3223 (2000).

⁶ In *United Artists*, AT&T Communications, Inc. (“AT&T”) asserted that United Artists was its customer and otherwise responsible for fraudulent long distance calls made from payphones operated by United Artists. The FCC concluded that United Artists did not affirmatively select AT&T but instead affirmatively declined to select a long distance carrier by selecting PIC NONE from the local exchange carrier.

charged for such services.⁷ Specifically, the FCC held that a customer could avoid any liability for long distance calls by selecting PIC NONE. Thus, the right to select a carrier or no carrier is the right of the customers and not the prerogative of the local exchange carrier. In the FCC Consumer Facts, available on the FCC's web site, the FCC advises consumers that they may decline to have a long distance carrier and may call their local carrier to terminate their current long distance carrier. Such changes are accomplished by the customer selecting PIC NONE.

In view of the foregoing, the Ratepayer Advocate submits that GTE Telephone Company's practice of bundling local and long distance is inconsistent with the rights of consumers to affirmatively select and order the services they want to subscribe to and otherwise violates the Communications Act.

In regard to the preemption issue, the Ratepayer Advocate submits that there is no need to address this issue because the issue involved, in the instant proceeding, is essentially about the long distance service that is clearly an interstate matter clearly within the jurisdiction of the FCC.⁸

Respectfully Submitted,
SEEMA M. SINGH, ESQ.
RATEPAYER ADVOCATE

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Christopher J. White, Esq.
Deputy Ratepayer Advocate

⁷ See 8 FCC Rcd. at 5566.

⁸ The FCC in its *Toll Dialing Parity Order*, 11 FCC Rcd. 19392, carved out a role for states to impose upon LECs certain presubscription methodologies as it pertains to intralata services. However, the state's authority is not implicated in this case because long distance is an interstate service, wholly within the jurisdiction of the FCC.